IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TYRONE KEYS,

Plaintiff,

v.

The BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN, and the NFL PLAYER DISABILITY & NEURCOGNITIVE BENEFIT PLAN,

Defendants.

Case No. 8:18-cv-2098-CEH-JSS

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO AMEND CASE MANAGEMENT AND SCHEDULING ORDER

Defendants Bert Bell/Pete Rozelle NFL Player Retirement Plan and NFL Player Disability & Neurocognitive Benefit Plan (together, "Plans") file this opposition to Plaintiff Tyrone Keys' Motion to Amend Case Management and Scheduling Order ("Motion to Amend," ECF 31). For the reasons described below and in the Plans' Motion to Vacate Scheduling Order ("Motion to Vacate," ECF 30), good cause exists to modify the current Case Management and Scheduling Order ("Scheduling Order," ECF 20) ***and*** set a new discovery deadline in this case. The Court should deny Keys' Motion to Amend and issue a new scheduling order (that includes a new discovery deadline) after the Plans answer Keys' amended complaint and bring their counterclaims.

BACKGROUND

In February 2018, the administrators of the Plan found that Keys had committed fraud against the Plans by: knowingly making false statements and providing incomplete documents;

hiding that he was involved in an auto accident so that he could claim higher, "football related" disability benefits; and failing to disclose workers' compensation benefits that would have offset the disability benefits provided to him by the Plans. As a result of this fraud, the Plans overpaid Keys by more than $1,000,000. The administrators suspended Keys' disability benefits until the overpayments to him were recovered, and Keys was informed that the Plans might take additional legal action to recover those overpayments.

On August 22, 2018, Keys filed suit. Compl. (ECF 1). He seeks reinstatement of benefits, and argues the Plans should have known of his fraud and are therefore estopped from taking action against him.

Keys has known from the beginning of this case that the Plans intend to counterclaim and seek a judgment against him to recover more than $1,000,000 in overpayments. The parties' joint Case Management Report (ECF 18) explicitly notes the Plans' intent to assert those counterclaims and take limited discovery with respect to them. *See* Case Mgmt. Rpt. at 10 ("Defendants intend to countersue Plaintiff to obtain a judgment against him in the amount of disability benefits overpaid to him, plus interest. Defendants anticipate minimal discovery with respect to these counterclaims."); Pl.'s Mem. in Opp. to Defs.' Mot. to Vacate Sched. Order ("Pl.'s Opp.," ECF 34) at 2 (conceding that the Case Management Report "expressly acknowledged" the Plans' intended counterclaim and anticipated discovery).

Shortly after the parties submitted the Case Management Report, the Plans moved to dismiss two counts of the Complaint ("Motion to Dismiss," ECF 19). The Court has now ruled on that motion—by granting it in part, denying it in part, and giving Keys leave to file an amended complaint. *See* Order (ECF 28, entered May 28, 2019). Keys filed an amended

complaint on June 11, 2019. Pl.'s First Am. Comp. (ECF 35). At this time, the Plans have not been able to answer Keys' amended allegations or join issue with their counterclaims.

On May 6, 2019, Keys' counsel suggested "a joint motion to extend the dispositive motion deadline." 5/6/19 E-mail fr. J. Dahl to M. Junk (Ex. A). Counsel for the Plans responded that they would not oppose, and stated: "Frankly, I would like to move for modification of the case management schedule because, if the case goes forward, I need to file an answer, I need to countersue, and I need to take discovery of Mr. Keys." 5/6/19 E-mail fr. M. Junk to J. Dahl (Ex. B). Later on May 6, Keys' counsel responded "I agree," and asked "Do you want to take a stab at a joint motion." 5/6/19 E-mail fr. J. Dahl to M. Junk (Ex. C). After counsel for the Plans shared a draft of the joint motion, Keys' counsel initially accepted it, only to withdraw his consent days later, after discussion with local counsel, stating that they "can't agree (must oppose) any request for an extension of the discovery deadline." 5/10/19 E-mail fr. J. Dahl to M. Junk (Ex. D) (agreeing to joint motion); 5/14/19 E-mail fr. J. Dahl to M. Junk (Ex. E) (withdrawing consent to joint motion).

Good cause exists to re-set the unexpired deadlines and the discovery deadline. The Plans should be allowed to take limited discovery after they answer Keys' amended complaint and join their counterclaims. Keys objects to a new discovery deadline because he believes the Plans are not entitled to any discovery. *See* Pl.'s Mem. Opp at 3-4 ("because this is an ERISA benefits case, Keys believes that discovery should be limited to the Administrative Record in any event"). Keys argues that there is no good cause to modify the now-expired discovery deadline. *See* Pl.'s Opp. at 2 ("Keys objects to Defendants' Motion to Vacate to the extent Defendants are attempting to use that motion as a vehicle to extend the discovery cut-off date without having established the requisite good cause.").

STANDARD OF REVIEW

Under Rule 16(b), a scheduling order can be modified "upon a showing of good cause." *S. Grouts & Mortars, Inc. v. 3M Co*., 575 F.3d 1235, 1241 (11th Cir. 2009); *Sosa v. Airprint Sys., Inc*., 133 F.3d 1417, 1418 (11th Cir. 1998). Good cause generally exists if the deadlines in the scheduling order cannot be met "despite the diligence of the party seeking the extension." *Sosa*, 133 F.3d at 1418; *Med. & Chiropractic Clinic, Inc. v. Oppenheim*, No. 8:16-CV-1477-T-36CPT, 2018 WL 4558442, at *3 (M.D. Fla. July 9, 2018) (J. Honeywell).

When a party seeks to modify an expired deadline, Rule 6(b)(1)(B) generally imposes an additional showing of "excusable neglect." *See Estate of Miller ex rel. Miller v. Thrifty Rent-A-Car Sys., Inc.*, 609 F. Supp. 2d 1235, 1251–52 (M.D. Fla. 2009) ("[W]hen a party files a motion for leave to amend a pleading after the relevant scheduling order deadline has passed, the party must demonstrate both good cause and excusable neglect for the untimely motion."). "The determination of excusable neglect is an equitable one." *Alan L. Frank Law Assocs., P.C. v. OOO RM Invest*, No. 16-22484-CIV, 2017 WL 9732057, at *1 (S.D. Fla. Jan. 12, 2017); *see also Fed. Trade Comm'n v. Vylah Tec LLC*, No. 217CV228FTM99MRM, 2018 WL 2970962, at *2 (M.D. Fla. June 13, 2018) ("Excusable neglect is at bottom an equitable principle, taking account of all relevant circumstances surrounding the party's omission.") (quotation marks and citation omitted). When evaluating whether a party has shown excusable neglect, courts generally consider (1) the danger of prejudice to the nonmoving party, (2) the length of delay and potential impact on proceedings, (3) the reasons for the delay, such as whether the delay was in the movant's control, and (4) whether the movant acted in good faith. *Advanced Estimating System, Inc. v. Riney*, 130 F.3d. 996, 997–98 (11th Cir.1997); *Oppenheim*, 2018 WL 4558442, at *3 (J. Honeywell); *Vylah Tec LLC*, 2018 WL 2970962, at *2 (M.D. Fla. June 13, 2018). Courts

typically accord "primary importance to the absence of prejudice to the non-moving party and to the interest of efficient judicial administration." *Vylah Tec*, 2018 WL 2970962, at *2.

ARGUMENT & AUTHORITIES

I. Good Cause Exists To Vacate The Scheduling Order And Issue A New One That Includes A New Discovery Deadline.

Good cause exists because the Plans were not able to conduct discovery regarding counterclaims not yet filed. The original Scheduling Order contemplated that the Plans' answer and counterclaims would be filed, and discovery completed, by May 10. That did not happen. The Court ruled on the Plans' motion to dismiss on May 28, and gave Keys permission to file an amended complaint. The Plans are currently evaluating the amended complaint that Keys filed on June 11, and still have not answered and joined their counterclaims as permitted by Rule 13(a). This constitutes good cause under Rule 16(b). *See Alan L. Frank Law Assocs., P.C.*, 2017 WL 9732057, at *3 (holding that good cause exists to modify a scheduling order and extend a discovery deadline to allow for discovery in connection with a counterclaim asserted in a defendant's timely answer).

Keys plainly errs when he argues that the Plans lacked diligence and should have served discovery by now. *See* Pl.'s Opp. at 3 ("if any discovery was warranted, it was incumbent upon Defendants to move forward with discovery"). The Plans' anticipated discovery relates to their ***unfiled*** counterclaims.[1] The Federal Rules do not authorize discovery in connection with unfiled or potential claims. *See* Fed. R. Civ. P. 26(b)(1) (authorizing discovery relevant to a claim or defense); *Fire Ins. Exch. v. United States*, No. 15-CV-1196-AJB-KSC, 2015 WL 11995254, at *4 (S.D. Cal. Oct. 30, 2015) ("Plaintiffs have offered no support for its position that it is entitled

[1] As noted above, the Plans' counterclaims will seek recovery of overpayments in excess of $1 million. Discovery will include inquiry into the amount of workers' compensation benefits paid to Keys in the past.

to conduct discovery on claims not yet asserted. Furthermore, Plaintiffs' position runs contrary to [Rule] 26(b)(1),… [and here,] Plaintiffs have not alleged a claim for negligence against [defendants], so discovery on a potential negligence claim falls outside the scope of Rule 26(b)(1)."); *Gonzales v. Goodyear Tire & Rubber Co*., No. CV 05-941 BB/LFG, 2006 WL 8443759, at *13 (D.N.M. Aug. 18, 2006) (denying motion to compel, noting that "[d]iscovery of other potential claims… goes beyond the scope of Rule 26").

Had the Plans served discovery as Keys says they should have, Keys likely would have moved, successfully, to quash it.

II. Neglect Should Not Be An Issue Because The Plans Diligently Requested And Obtained An Extension Agreement.

A. Any delay in bringing a motion was due to circumstances beyond the Plans' control.

The Plans were aware of the May 10 deadline. Rather than file a unilateral motion to modify the Scheduling Order, the Plans' counsel appropriately sought an agreement with Keys' counsel to set new deadlines. On May 6, the parties agreed on a joint motion to extend or re-set all relevant deadlines, ***including the discovery deadline***. Per Keys' counsel's request, the Plans' counsel drafted that motion and shared it with Keys' counsel on May 10, with the expectation of filing it. However, Keys' counsel unexpectedly withdrew his consent, leaving the Plans no choice but to file their own, contested motion after the discovery cutoff.

The question of neglect should not factor into the Court's good cause analysis. *See Alan L. Frank Law Assocs., P.C.*, 2017 WL 9732057, at *3 ("[G]iven their diligence, an analysis of excusable neglect is not appropriate, as the failure to meet the deadlines was the not the result of the [moving party's] neglect."). The Plans acted diligently and in good faith, and Keys should be estopped from contesting the Plans' motion on the basis of when it was filed. Litigation is not a

game of "gotcha," but a process for seeking the truth. *See Norelus v. Denny's, Inc*., 628 F.3d 1270, 1287 (11th Cir. 2010) ("We give district courts latitude in exercising their authority to manage litigation instead of looking for a chance to say 'gotcha' procedurally."); *United States v. Shaffer Equip. Co*., 11 F.3d 450, 457 (4th Cir. 1993) ("Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice."); *Bautista v. Star Cruises*, 696 F. Supp. 2d 1274, 1281 (S.D. Fla. 2010) (the purpose of the court system is "to seek the truth in order to do justice"). Discovery is an essential part of this truth-seeking process.

B. Keys will not be prejudiced by a new discovery deadline.

A new discovery deadline will not prejudice Keys. He has long known that the Plans intended to bring counterclaims and serve discovery. *See* Case Mgmt. Rpt. at 9-10 (noting the Plans' intent to countersue and issue discovery); Pl.'s Opp. at 2 (citing Case Management Report, which disclosed the Plans' intent to countersue and take discovery). Keys will not lose the ability to object to any discovery that he deems improper.

On the other hand, the prejudice to the Plans would be profound. The Plans have substantial evidence that Keys committed fraud in several ways. Fundamental fairness dictates that the Plans be afforded the opportunity to prosecute their counterclaims to recover more than $1,000,000 in overpaid benefits.

C. The overall impact on the administration of this case will be minimal if a new discovery deadline is set.

This case is still in early stages. When it moves forward, there will be no discovery with respect to Keys' claims. *See* Pl.'s Opp. at 3-4 (stating Keys' position that "because this is an ERISA benefits case,… discovery should be limited to the Administrative Record in any event"). The Plans expect that discovery on their counterclaims will be limited. *See* Case Mgmt. Rpt. at

10 ("Defendants anticipate minimal discovery with respect to these counterclaims."). Setting a new discovery deadline would cause only minimal delay, and not adversely impact the fair and efficient administration of this proceeding. Because Keys also wants to extend the deadlines in this case, he has no basis to object to any minimal delay occasioned by a new discovery deadline.

III. The Court Should Wait Until the Plans Answer Keys' Amended Complaint To Set New Deadlines.

Regardless of whether the Court sets a new discovery deadline, Keys' separate proposal to extend (some) deadlines by 90 days should be denied because it is inefficient. Keys filed his amended complaint on June 11. The Plans must now respond to the amended complaint. The Plans suggest it would be more efficient, and respectful of the Court's time, to vacate the current Scheduling Order, and issue a new Case Management and Scheduling Order after the Plans answer Keys' amended complaint and file their counterclaims.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's Motion to Amend and, instead, grant Defendants' separate Motion to Vacate.

Dated: June 11, 2019

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